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A Union by Any Other Name? How Capital Misses the Mark on the Position of Worker Centers within the Current Labor Law Regime

*Elizabeth Dailey

I. Introduction

Worker centers, community-based organizations that serve the most marginalized and unrepresented workers in American society, are under attack, again. With the decline of traditional labor unions in recent decades, worker centers have emerged to fill the void left by this decline and to organize and amplify the collective voice of low-wage, largely immigrant workers. These worker centers seek to rebalance the relative collective bargaining power between labor and capital in the 21st century economy. Technological advances, globalization, and the continued growth of the service sector have led to socioeconomic changes that have little resemblance to the industrial society that existed at the time the labor laws were initially adopted. In this new work environment, workers toil at poverty wages and in deplorable working conditions. As employers reconstruct their businesses to reduce payroll costs, workers have been isolated and left relatively powerless to voice their concerns and assert their rights. It is in this context that the worker centers have begun to organize the new working class and to push for local and national enforcement of their rights.

Currently unencumbered by the requirements and limitations under the national labor law regime, worker centers have been able to deploy tactics that have been denied to traditional labor unions. Primarily, worker centers are not subject to the prohibition against secondary boycotts under the NLRA. As such, worker centers have not been stymied by the changing nature of the employment landscape and decentralized business model. Worker centers have been successful in applying economic pressure on business entities that, while not in a direct labor dispute with workers, have significant influence over working conditions. This success has angered business groups, who have continually called for the NLRB and the Department of Labor to determine that worker centers are statutory labor organizations that must abide by the same rules as labor unions. While initial decisions by these agencies suggest that they will not be held to be labor organizations under the law, the change in administrative tides may bring a drastic change to the agencies' interpretations of the labor law provisions and case law precedent.

In this paper, I will present an overview of the current "labor organization" question being asked by pro-business groups and offer a textual and policy-based argument for why worker centers should not be held to be statutory labor organizations and required to comply with the stringent labor law provisions. In enacting the Wagner Act in 1935, Congress announced the national labor policy: to ensure labor peace through the balancing of bargaining power between capital and labor, which requires that the rights of labor to organize and to select a collective bargaining representative be recognized and enforced. While much has changed since 1935, this is still the stated labor policy of the United States. The service, organizing, and advocacy conducted by worker centers on behalf of low-wage, immigrant workers furthers this policy in contemporary times. These organizations utilize the principles and protections inherent in the labor laws to improve the bargaining position of low-wage workers and to hold employers accountable for violations of the labor law protections. Requiring worker centers to comply with the law's restrictions on tactics and reporting and disclosure requirements would inhibit the flexibility and experimentation that has been key to the success of these groups in countering capital's powerful bargaining position. Applying the current labor law regime to worker centers

would not only be inapposite to the terms of the statute, it would be in contravention of the stated national policy underlying these laws.

Part II will discuss the rise of worker centers to provide a collective voice to marginalized workers and outline the typical worker center model. Part III will give an overview of American labor law, which is crucial to understanding why the requirements and prohibitions embedded in the current form of the National Labor Relations Act would be inappropriate if applied to worker centers. Part IV will discuss weaknesses under the current labor law regime, including protections that were not included in the original statutes, the shortcomings NLRA in remedying violations committed by employers, and weaknesses stemming from changes in the socio-economic context to which the law has been unable to adapt. Part V provides an overview of business groups' response to the worker center movement and the relevance of this response in the dawn of Trump. In Part VI, I provide an analysis of the "labor organization" question and offer textual, policy, and constitutional arguments as to why worker centers do not and should not be considered statutory labor organizations and held to the same restrictive standards as traditional labor unions.

II. Worker Centers: A New Species of Concerted Activity

A. The Restaurant Opportunities Center rises from the ashes of tragedy to advocate on behalf of low-wage restaurant workers

The Restaurant Opportunities Center (ROC) serves as a prime example of and helpful model to better understand this new species of labor organization as pro-business groups frequently target ROC in their campaigns to have worker centers fall under the provisions of current labor laws.¹ ROC was originally started as a project of the Hotel Employees and Restaurant Employees (HERE) local union chapter in New York City in order to further support the surviving former workers of the Windows on the World restaurant in the World Trade Center who lost their jobs after the September 11th terrorist attack.² In 2003, ROC, under the leadership of Saru Jayaraman, established itself as an independent organization to represent low-wage, largely "back of the house" restaurant workers.³ The tragedy of September 11th helped to bring the working conditions of the restaurant industry to national attention and served as a rallying point for ROC to engage industry members and the general public to demand better enforcement of labor and employment laws as well as more protective legislation.⁴

The initial mission of ROC was to assist former employees of the Windows on the World in looking for new jobs and obtaining relief support.⁵ However, an opportunity to establish itself as the voice of the restaurant worker soon arose when the owner of the Windows on the World opened a new restaurant and refused to hire his former employees.⁶ After organizing a protest

¹ Thomas I.M. Gottheil, *No Part of the Bargain: Worker Centers and Labor Law in Sociohistorical Context*, 89 N.Y.U. L. REV. 2228, 2261 (2014)

² *Id.*; Saru Jayaraman, *From Triangle Shirtwaist to Windows on the World: Restaurants as the New Sweatshops*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 625, 640 (2011).

³ Gottheil, *supra* note 1 at 2261.

⁴ See Jayaraman, *supra* note 2 at 639 (explaining that most of the Windows employees who perished on September 11th were low-wage immigrant workers. As the government-funded Victim Compensation Fund distributed money to families based on victim's income and age, the deaths of these workers left their families with very little in terms of compensation). The Windows employees "had worked at the highest grossing restaurant in the United States, but had earned between \$200 and \$300 weekly...." *Id.*

⁵ *Id.* at 640.

⁶ *Id.*

outside of the new restaurant that received a lot of publicity, the owner agreed to hire the Windows workers.⁷ In response to this success, restaurant workers began to flock to ROC to help them address violations in their workplaces.⁸ Since then, ROC has grown into a national worker center with local affiliates in 8 states as of 2011.⁹

Today, ROC conducts participatory research and organizes restaurant workers to lobby local and national legislatures to adopt more protective legislation on issues including minimum wage and paid sick leave.¹⁰ Choosing to target upscale, fine dining establishments to enhance the public interest of their campaigns, ROC conducts “high profile campaigns against exploitation in fine dining restaurant companies”.¹¹ A large part of what ROC does centers on litigation against violating employers for wage theft, discrimination, dangerous work conditions, and other violations of the employment and labor laws.¹² Litigation is usually supplemented with public demonstrations, which usually result in employers settling disputes out of court by agreeing to reinstatement, back wages, and the promise “to take affirmative steps to ensure compliance with the law in the future.”¹³ ROC attempts to involve its members in every step of the litigation to further member leadership and active participation.¹⁴ Additionally, ROC provides leadership development programs and works to promote the “high road” to profitability by partnering with “responsible” employers.¹⁵ Membership within ROC is treated as a privilege, conditioning help with an employment issue with a requirement to attend educational classes on employment, health, and safety rights.¹⁶

The stated mission of ROC is “to improve wages and working conditions for the nation’s restaurant workforce.”¹⁷ Citing the size and strength of the National Restaurant Association, ROC founder Saru Jayaraman describes restaurant workers’ weak bargaining position and vulnerable social and economic position as the genesis of ROC’s independent identity.¹⁸ Restaurant workers, who tended to be low-wage immigrant workers, “faced conditions of poverty wages, shaved hours, lack of lunch breaks, health and safety hazards, discrimination and more”.¹⁹ Through its flexible strategies, member-oriented practices, and emphasis on industry cooperation, ROC serves as a “powerful national vehicle for restaurant workers to lift their

⁷ *Id.*

⁸ *Id.* at 641.

⁹ *Id.*

¹⁰ *See id.* at 640; *Gottheil*, *supra* note 1 at 2261.

¹¹ *Jayaraman*, *supra* note 2 at 641.

¹² *See Gottheil*, *supra* note 1 at 2261-62.

¹³ *Id.* at 2262.

¹⁴ *Id.*

¹⁵ *Jayaraman*, *supra* note 2 at 641. *See also* RESTAURANT OPPORTUNITIES CENTER UNITED, <http://rocunited.org/our-work/#promoting-the-high-road> (last visited Apr. 8, 2018) (“Engaging employers through our “high road” employer association RAISE, which provides: training, technical assistance, and a peer network of like-minded employers following the high road to profitability, which includes higher wages and working conditions for those employed at their restaurants; leadership development and civic engagement opportunities; research and communications work that documents the benefits for all three stakeholders of taking the high road and more.”).

¹⁶ *Gottheil*, *supra* note 1 at 2262.

¹⁷ RESTAURANT OPPORTUNITIES CENTER UNITED, <http://rocunited.org/about-us/> (last visited Apr. 8, 2018).

¹⁸ *Jayaraman*, *supra* note 2 at 636.

¹⁹ *Id.*

collective voice”²⁰ to bring labor and employment law noncompliance to national attention and force State involvement in “labour standards enforcement”.²¹

B. Community organizations respond to the needs of low wage workers

Without exception, the literature on worker centers is based on the findings of a survey²² conducted by Janice Fine with the support of the Neighborhood Funders Group and the Economic Policy Institute published in 2006. The survey offers an in-depth analysis of the history and common features of worker centers, enabling academics and other interested parties to define this relatively recent phenomena. While this study remains incredibly useful today, it would be appropriate for a follow up study in the near future to document any changes in the composition, overall mission, and organizing strategies of these groups. As the question of whether an entity is a labor organization under the NLRA or LMRDA has been a fact intensive inquiry, it will be important to have up-to-date information on both the explicit purpose of worker centers and the activities undertaken by these groups. With this caveat, I have summarized some of the key findings of the 2006 study below that are most relevant to this paper.

“Worker centers are community-based mediating institutions that provide support to low wage workers.”²³ Worker centers generally have non-profit tax exempt status and largely run on the financial support of charitable foundations.²⁴ As reported, there were 137 worker centers as of 2005, and 122 of the worker centers primarily served immigrant workers.²⁵ While these worker centers may have their roots in different types of social and civil organizations, Janice Fine found that worker centers in general have a common origin story. In the most general sense, worker centers have emerged to fill the void in the “decline of institutions that historically provided workers with a vehicle for collection action”, and immigrant work centers in particular have emerged in response to the influx of immigrant workers and the absence of social institutions to serve the needs of this group.²⁶ Worker centers started out as NGOs, social service organizations, churches, legal aid societies, and university organizations, and have transformed into the complex and dynamic institutions that they are today due to a “common desire for a local organization that would provide services, conduct advocacy, and encourage organizing on the part of low-wage workers in the absence of anything else.”²⁷

Janice Fine describes the common origin story of a majority of worker centers as starting with a “catalyzing event” that sent workers in search of a support organization:

“These workers and the allies they find to help them then try to figure out how to address the immediate situation but often discover that the particular issue they have confronted is emblematic of a much larger problem, and one that no existing

²⁰ *Id.* at 640.

²¹ See Janice Fine, *New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States*, 66 RELATIONS INDUSTRIELLES 604, 614 (2011) (discussing the work of worker centers in general in publicizing employer violations of current labor law standards and advocating for better government enforcement).

²² JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF A DREAM (2006).

²³ *Id.* at 2.

²⁴ See Fine, *supra* note 21 at 606; Jarol B. Manheim, THE EMERGING ROLE OF WORKER CENTERS IN UNION ORGANIZING: AN UPDATE AND SUPPLEMENT, U.S. CHAMBER OF COMMERCE 57 (2017) (finding that worker centers depend almost entirely on donations from “progressive activist foundations” while traditional labor organizations have “kept at arm’s length” from these new organizations).

²⁵ *Id.* at 3.

²⁶ *Id.* at 14.

²⁷ *Id.* at 14-15.

organization is addressing. In this way, a host of ethnic NGOs, churches, legal aid centers, social service agencies, and university communities have almost literally ‘backed into’ organizing and advocating for low-wage workers. They did so upon discovering that a service approach was simply not enough and that there was a void in terms of institutions for collective action among low-wage workers. As widely as these institutions differ from one another in form and function, most seem to have settled on the worker center model when their existing programs and strategies proved inadequate.”²⁸

This origin story shared by many worker centers reflects a history of flexibility, adaptation, and ability to recognize and accommodate unmet needs of low wage workers. As will be discussed below, the activities and strategies carefully selected by worker centers allows for this flexibility that allows worker centers to service a new class of workers that traditional unions have been unable to organize.

C. Worker centers: A national survey

By offering a combination of services, advocacy projects, and organizing opportunities, worker centers distinguish themselves from other community centers and social service groups.²⁹ Worker centers have become an important feature in immigrant communities, serving as “gateway organizations that are meeting immigrant workers where they are and providing them with a wealth of information and training.”³⁰ Worker centers may take various approaches to their work depending on the needs of the workers in the communities they serve³¹, but, as Janice Fine discovered in her study, worker centers engage in a lot of the same activities and have a lot of features in common.³² First, most worker centers offer individualized legal services to workers in helping them to file claims against their employer with government agencies.³³ Worker centers provide education services to community members, including “know your rights” information materials and support in various languages³⁴, ESL instruction, advocacy and organizing training, and leadership development. These institutions lead both policy campaigns and direct economic campaigns directed at government officials and industry members.³⁵ Many worker centers

²⁸ *Id.* at 15.

²⁹ *Id.* at 2 (defining the service, advocacy, and organizing work of worker centers as: “*Service delivery*: providing legal representation to recover unpaid wages; English classes; worker rights education; access to health clinics, bank accounts, and loans. *Advocacy*: researching and releasing exposés about conditions in low-wage industries, lobbying for new laws and changes in existing ones, working with government agencies to improve monitoring and grievance processes, and bringing suits against employers. *Organizing*: building ongoing organizations and engaging in leadership development among workers to take action on their own for economic and political change.”

³⁰ *Id.* at 5.

³¹ *Id.* at 20 (explaining that 56% of the worker centers surveyed performed industry-specific organizing where they assisted workers in the creation of organizations focused on improving wages and working conditions within a specific industry in a particular geographic area; 44% of centers surveyed did not engage in industry-specific organizing and instead worked with workers across industries in a particular geographic area to address non-industry specific issues).

³² *Id.* at 12.

³³ *Id.* at 78 (explaining the process by which worker centers seek to assist individuals with their grievances against their employers, which begins with the worker centers reaching out directly with the employer to discuss the claim. If this proves unsuccessful, the legal staff members at worker centers will help workers fill out complaint forms, gather the necessary documentation to support their claim, and file the complaint with state and federal agencies).

³⁴ *Id.* at 75, 77.

³⁵ See *infra* notes 98-106.

engage in direct economic action against individual employers on behalf of workers³⁶, and they may organize industry level or sectoral direct economic action campaigns if appropriate. Most worker centers also serve an important function as immigrant rights advocates in their communities as well as on a broader social level.³⁷

Second, while worker centers vary in their program offerings and strategic decision-making, most share some common features in addition to offering a combination of service, advocacy, and organizing efforts³⁸:

- “Place-based rather than work-site based:” Unlike traditional labor unions, worker centers are not worksite-based and do not focus their activities toward any particular employer or workplace. Worker centers do not seek to be the exclusive collective bargaining representative of any group of workers, and therefore do not seek to establish majority support within any individual employer.
- “Strong ethnic and racial identification:” While some worker centers seek to assist workers within a particular industry, many worker centers organize along ethnic or racial lines. These worker centers understand that issues of race and ethnicity intersect with economic and social issues in important ways and seek to address this.
- “Leadership development and internal democracy:” Most worker centers make worker participation a central feature of their organization, and they strive to involve members in all decision making. To accomplish this, many centers provide leadership development programs that train workers on how to meaningfully participate in the activities of the center.
- “A broad agenda:” While employment issues are the primary focus of many worker centers, these institutions have taken a broader approach to serving their communities and often respond to the various social, political, health, legal, education, and housing issues of their members.
- “Coalition building:” Worker centers have joined both formal and informal alliances with other community organizations, government agencies, and traditional unions.
- “Small and involved memberships:” Most worker centers “view membership as a privilege that is not automatic but must be earned” and require workers to complete classes or workshops on worker rights in order to become a member.

In general, worker centers face a difficult dilemma with respect to the services they decide to provide to community members. There is a concern among contemporary community organizations that “doing for others” is inefficient as it diverts attention and resources away from achieving the long-term benefits of “teaching them to do for themselves.”³⁹ Worker centers have made a conscious choice to focus on long-term change and social transformation, which is dependent on social justice reform and improved economic policies.⁴⁰ The goal of worker centers is to promote collective action approaches to change by showing workers that “the solution to their situation requires collective action to alter the relations of power and win concrete

³⁶ *Id.* at 81 (often times, worker centers will supplement or substitute for litigation against an employer by organizing pickets or boycotts of violating employers involving the workers of the employer as well as other supporters. Worker centers often use these direct action campaigns to garner media attention).

³⁷ *Id.* at 12.

³⁸ *Id.* at 13-14.

³⁹ *Id.* at 72.

⁴⁰ *Id.*

victories.”⁴¹ However, worker centers also realize that workers, particularly immigrant workers, are struggling now and the promise of far-off change does little to alleviate the poor working conditions and oppressive employment situations these workers find themselves in.⁴² Without the worker centers, many of these workers would not have access to legal redress for their employment issues. Additionally, the provision of services helps to attract new workers to the worker center and establishes the legitimacy of the worker centers within the low wage, immigrant worker community.⁴³ Lastly, the legal services offered by worker centers enable these organizations to collect data and cultivate compelling worker narratives that will be used in the centers’ advocacy campaigns to win the sympathy of government officials and the general public.⁴⁴

The organizing activities of worker centers can be described as falling into one of two categories, although campaigns often fall into both categories: “economic action organizing” and “public policy organizing”.⁴⁵ In their economic action organizing, worker centers have sought to address head on the obstacles subcontracting and decentralized production schemes pose to organizing and work to “unpack the production chain in order to identify the real powers-that-be in an industry and force them to take responsibility for their subcontractors’ behavior.”⁴⁶ Through lawsuits, local pickets and protests, national boycott campaigns, and carefully crafted settlement agreements, worker centers have successfully “extend[ed] culpability up the production chain from subcontractors to manufacturers and retailers.”⁴⁷ To further help breach the “structural mismatch between the approach to union organizing specified by the Act and the approach that makes sense for workers in the low wage economy”⁴⁸, worker centers partner with government agencies to strengthen the enforcement mechanisms of existing laws and to advocate for new industry or sectoral level regulation and policy changes.⁴⁹

In addition to public policy organizing in pursuit of improved enforcement of current labor protections and of policy changes to address issues that are not properly addressed under existing labor law, worker centers engage in other forms of public policy organizing at the local and national level to address issues that can be broadly categorized as social justice reform⁵⁰,

⁴¹ *Id.* at 73.

⁴² *Id.* at 72.

⁴³ *Id.* (“It is in the context of their dual oppression as workers and immigrants, the long-term nature of solutions, and pressing short term needs that the majority of worker centers have come around to the necessity of service delivery.”).

⁴⁴ *Id.* at 79.

⁴⁵ *Id.* at 101.

⁴⁶ *Id.* at 102-03.

⁴⁷ *Id.* at 103-04 (using the campaign the Garment Worker Center waged against the Forever 21 label in the early 2000s as an example of the tactics used by worker centers to put economic pressure on business entities in positions of power and control over the terms and conditions of the workers in the bottom-most level of the production chain).

⁴⁸ *Id.* at 161 (“The NLRA...was designed with large, stable employers and worksites in mind, which unions, it was presumed, would organize and bargain with on a single-employer basis. But many low-wage workers have small and diffuse worksites, and they are employed by businesses in highly competitive industries who very often cannot act on their own to raise wages and improve working conditions because they would be at a severe competitive disadvantage. In these situations, low-wage workers need multi-employer bargaining on a geographic/industrial, or chain-of-production/business network basis.”).

⁴⁹ *Id.* at 162, 171.

⁵⁰ *Id.* at 191 ([M]any worker centers do not focus exclusively on labor and employment issues—or immigration issues. Their broad ‘social justice’ agendas mandate that they also organize around racism and domestic violence, education and youth, housing and development, and health care issues.”)

with immigration reform being a primary topic.⁵¹ To worker centers, workers' fight against discrimination, xenophobia, and racism are just as important and in need of collective action-based strategies as their wage and conditions of work-based issues.⁵² Worker centers actively participate in local and national immigrant rights coalitions through protests and rallies, activities that resemble those conducted in economic action organizing.⁵³

On a final note regarding the common features of worker centers, the internal structure of worker centers may vary depending on the goals of the organization and the financial resources available but are similar in that the internal governance and organization style is flexible and highly influenced by centers' long-term orientation. As worker centers tend to focus on future economic and social transformation, they subsequently devote a lot of time and energy on cultivating the internal life of their group and on developing the leadership potential of their members.⁵⁴ Worker centers strive to establish and maintain internal democracy, encouraging high levels of participation in center programming and decision making.⁵⁵ Unlike traditional labor unions, membership in worker centers is not based on dues⁵⁶ or of signing representation cards. Rather, membership is a privilege to be earned through participation and becoming educated in the realm of workers' rights.⁵⁷

D. Relationship between worker centers and traditional labor unions

Worker centers have varying relationships with traditional labor unions, where some worker centers work independently of unions and some centers work in collaboration with unions on industry or sector based organizing drives.⁵⁸ Across these diverse relationships, the underlying reality is that worker centers and traditional unions are different. Culture differences exist between these two types of groups, with worker centers viewing labor unions as being undemocratic, top-down, and unresponsive to the needs of community members.⁵⁹ Unions view worker centers as "undisciplined and unrealistic about what it takes to win."⁶⁰ Where unions have an established process for governing their organization and for structuring negotiations with employers, worker centers remain flexible in their approach to organizing, experimenting with new tactics based on the needs of its members.⁶¹ With these core differences, many worker centers and unions were initially hostile toward each other and were "explicitly rejectionist" of the activities of the other.⁶²

⁵¹ *Id.* at 180 ("Many worker centers view their work as much through a social justice frame—championing the rights of immigrants and people of color generally—as they do through a workers' rights frame.").

⁵² *Id.*

⁵³ *Id.* at 188.

⁵⁴ *Id.* at 201.

⁵⁵ *Id.* at 202-03.

⁵⁶ At the time the survey was conducted, dues were not seen by the majority of worker centers as being a central part of their overall budget. *Id.* at 221. The study revealed several reasons for why worker centers were not collecting or relying on dues to support their activities, ranging from moral opposition to the concept of paying for membership to a lack of internal structure to collect and process dues. *Id.* at 221-22. Rather, worker centers rely primarily on charitable donations from large foundations. *Id.* at 218.

⁵⁷ *Id.* at 210.

⁵⁸ *Id.* at 120.

⁵⁹ *Id.* at 124.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Janice Fine, *New Forms to Settle Old Scores: Updating the Worker Centre Story in the United States*, 66 RELATIONS INDUSTRIELLES 604, 617 (2011).

However, the more recent trend has been toward a symbiotic relationship between unions and worker centers in the form of partnerships and collaborations.⁶³ Due to their greater resources and experiences in organizing workers, unions offer guidance, infrastructure support, and financial support to worker centers.⁶⁴ Worker centers in turn will often help workers connect with local unions in the community to address their individual service needs, as worker centers have had more success than unions in organizing the low-wage, immigrant communities.⁶⁵ In a later article written to update and supplement her initial 2006 study, Janice Fine indicated a growing trend toward federation whereby “strong individual centres have joined existing national networks or formed new ones which have, in turn, helped to establish new organizations or affiliate existing ones.”⁶⁶ Worker centers have utilized their expanding networks to leverage collective power in campaigning for “global worker justice, immigrant rights, the rights to organize for workers historically excluded from collective bargaining rights and the right to decent work and living conditions in America’s cities.”⁶⁷

Janice Fine has commented that the success of worker centers in “the largely non-union service economy, low-end construction, meatpacking, light manufacturing...and in industries and among constituencies unions had given up long ago as too difficult to organize” is due in large part to the fact that worker centers are not constrained by the current labor law scheme.⁶⁸ Unlike traditional unions, worker centers have not been “stripped... of some of their most potent tactics”.⁶⁹ As such, worker centers are able to act as “organizing laboratories”, testing out new strategies and techniques for organizing low-wage workers.⁷⁰ In Part VI.B.2, I will argue that applying the provisions and strictures of the current labor law scheme would limit the effectiveness of worker centers in engaging employers in ways that extend beyond the permissible limits under the law to combat the new challenges facing low-wage workers in the 21st century economy.

III. The Long and Short of American Labor Law: From the Wagner Act to the Landrum Griffin Act

The current labor law regime, encapsulated by the National Labor Relations Act and its subsequent amendments, has not been substantially updated since 1959. As will be discussed in Part II of this paper, the labor laws as interpreted and applied have proven to be ineffectual in protecting the rights of workers to organize and act for mutual aid or protection in recent years. However, there is much to be gleaned from the history of these laws and the underlying policy decisions. The issues Congress found to be widespread and sought to address in passing the NLRA in 1935 are very much alive today. The stated goal of empowering workers by equalizing bargaining power between capital and labor offers support to the argument that worker centers should remain free from the restraints of an ill-suited labor regime in order to assist low wage workers who, like the blue-collar workforce of the 1930s, have been unable to enforce their rights against the power of capital.

⁶³ *Id.*

⁶⁴ Janice Fine, *Alternative Labour Protections Movements in the United States: Reshaping Industrial Relations?*, 154 INTERNATIONAL LABOUR REVIEW 15, 19 (2015).

⁶⁵ *Id.*

⁶⁶ *Fine, supra* note 21 at 615.

⁶⁷ *Id.* at 620.

⁶⁸ *Id.* at 606, 609.

⁶⁹ *Id.* at 606.

⁷⁰ *Id.*

A. Wagner Act promises workers a place at the bargaining table

Despite the productivity and prosperity that characterized post-WWI America, the blue-collar working class did not equally share in this abundance⁷¹. Following a boom in consumer-oriented industries and consumer products, many of America's working class found themselves unable to partake in the consumption and began to struggle to support themselves and their families⁷². The position of American workers became even more desperate as America and the rest of the world entered the Great Depression after the stock market crash of 1929. A master orator, President Franklin Roosevelt articulated the needs of America's workers as being a need for both freedom from want and from the oppression of industrial tyranny⁷³. In support for the National Industrial Recovery Act, an early attempt to address the labor unrest, President Roosevelt framed the purpose of government interference in labor relations as being "to restore our rich domestic market by raising its vast consuming capacity."⁷⁴ A particular "American" standard of living was being posited as a right of citizenship, where freedom from want was to be as respected as the "classically liberal freedoms of religion and speech."⁷⁵

Even prior to the start of the Great Depression, there was a view held by some radicals that a great contradiction existed between capitalism and democracy. Where outside of the realm of corporate America values of personal autonomy and democratic participation were lauded, these values were often punished and prohibited inside of private enterprises.⁷⁶ President Roosevelt, aware of the need for a national movement for industrial democracy, stated that "[a] small group had concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor—other people's lives. For too many of us life was no longer free; liberty was no longer real; men could no longer follow the pursuit of happiness."⁷⁷ As such, it was the duty of modern government to insure that the rights of American citizenship, "due process, free speech, the right of assembly and petition", were enforced in the workplace so that labor and capital were equals.⁷⁸

Incorporating protections set out in previous labor laws and addressing the loopholes that employers had exploited in previous acts, the Wagner Act of 1935, officially titled the National Labor Relations Act, identified the core collective action rights of workers and prohibited company-dominated unions as well as any other employer promulgated unfair labor practice designed to interfere with the exercise of workers' rights under the act.⁷⁹ Section 7 of the NLRA, inspired in large part by Section 7(a) of the National Industrial Recovery Act, insured workers the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection".⁸⁰ The act's restrictions and prohibitions were entirely aimed at employers, and it explicitly forbid employers to restrict,

⁷¹ See MELVYN DUBOFKY & FOSTER R. DULLES, *LABOR IN AMERICA: A HISTORY* 223 (2010) ("Many segments of labor did not appear to have been invited to the feast plenty that was provided by economic expansion, and even those groups of workers who profited most from the upward trend of wages could still feel that their share of the awards of prosperity were by no means commensurate with the far greater profits being made by businessmen.").

⁷² NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 22-23 (Rev. ed. 2013).

⁷³ *Id.* at 25-32.

⁷⁴ *Id.* at 25.

⁷⁵ *Id.* at 26-27.

⁷⁶ *Id.* at 31.

⁷⁷ *Id.* at 31-32.

⁷⁸ *Id.* at 32.

⁷⁹ DUBOFKY & DULLES, *supra* note 71 at 252.

⁸⁰ 29 U.S.C. § 157; See also DUBOFKY & DULLES, *supra* note 71 at 252.

coerce, or in any way interfere with employees' exercise of their protected rights.⁸¹ The justification of the overtly pro-labor lean was that "only through government support could labor meet management on anything like equal terms in an industrialized society, and that the time had come when the scales, always so heavily weighted in favor of industry, should be redressed in favor of the workers."⁸²

This policy was written directly into Section 1 of the NLRA. Summarizing Congress' findings regarding the labor unrest common at the time, Section 1 states that industrial strife and the resulting disruption in the free flow of commerce was due in part to "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association".⁸³ Section 1 declares it to be the national policy to eliminate and monitor causes of industrial strife by protecting the exercise of employees' rights to "self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."⁸⁴ Congress' value determinations and policy choices toward national labor relations in this moment in time were consistently articulated in statements made about the NLRA, in the NLRA itself, and in the monumental Supreme Court decision validating Congress' authority and respecting its decision.

Despite a tradition of hostility toward previous labor laws, the Supreme Court upheld the NLRA against a constitutional challenge in *NLRB v. Jones & Laughlin Steel Corporation*.⁸⁵ In writing for the majority, Chief Justice Hughes summarized the labor policy that Congress, as well as the Court, had come to adopt, a statement encompassing the formal position of the United States toward workers' rights:

"Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer. That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents...Long ago, we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer."⁸⁶

While the current labor scheme has been amended with a more favorable treatment of business interests,⁸⁷ the underlying principles have remained the same. Congress codified the importance of striking a balance between the relative power of labor and capital. As Chief Justice Hughes commented, the situation before Congress in 1935 necessitated government intervention on behalf of workers who were deemed to be helpless and powerless absent the legal protections of

⁸¹ *Id.* at 253.

⁸² *Id.* at 252-53.

⁸³ 29 U.S.C. § 151

⁸⁴ *Id.*

⁸⁵ 301 U.S. 1 (1937).

⁸⁶ *Id.* at 33.

⁸⁷ See *infra* Sections III.B and III.C.

their right to organize and collectively act for mutual aid and support. As I will argue in Part VI.B, the current situation demands action to elevate workers to an equal bargaining position as employers. Abiding by the policy choices articulated in the passing of the NLRA, Congress, the Department of Labor, and the NLRB should recognize the weakened bargaining power of low-wage workers and facilitate, or at least refuse to inhibit, the worker centers that have emerged to reassert the rights of workers *vis a vis* offending employers.

B. Increase in anti-union sentiment leads to the Taft Hartley Act

As industry commenced a reconversion of its facilities to adjust to peacetime production after WWII, workers found themselves being laid off in large numbers or taking home smaller wages.⁸⁸ Determined not to lose the gains it had achieved during the war, organized labor engaged in a series of strikes, constituting what has been called the “1945-1946 Strike Wave”.⁸⁹ This wave of labor unrest intensified a pre-existing anti-union drive among those, particularly in the corporate community, who felt the Wagner Act had made the labor unions too powerful as it imposed no restrictions on labor.⁹⁰ Through propaganda campaigns, business labeled unions as selfish special interest groups who operated against the public interest.⁹¹ As agitation for an amendment to the balance of power in the Wagner Act grew and organized labor remained steadfast in its opposition to any change to the act, the Taft Hartley Act, legislation “heavily slanted against labor organizations”, was passed in 1947 over President Truman’s veto.⁹²

The Taft Hartley Act, which became known later on as the Labor Management Relations Act of 1947⁹³, amended the Wagner Act to include protections for managerial rights and to “provide workers the same protections from labor organizations that the Wagner Act offered from employers.”⁹⁴ For the purposes of this paper, the act’s restriction on secondary boycotts is the most relevant. Secondary boycotts have been described as “protests or pickets by a union against a business with which it does not have an actual or potential bargaining relationship”.⁹⁵ The restriction against secondary boycotts is relevant because this form of boycott or picket is a powerful tactic, exerting economic pressure on an employer by directing action against another entity that does business with the employer. As explained in Part II, worker centers have successfully utilized this strategy to bring economic pressure against an entity that lies further up the supply chain or that has created distance between itself and the workers in question through a subcontracting relationship. The prohibition on secondary boycotts under the Taft Hartley Act applies only to statutory labor organizations, meaning that worker centers could lose access to

⁸⁸ DUBOFSKY & DULLES, *supra* note 71 at 318.

⁸⁹ *Id.* at 317.

⁹⁰ *Id.* at 325 (“By outlawing unfair management practices only, the union critics contended, the Wagner Act left labor free to engage in all kinds of improper and sometimes coercive behavior.”).

⁹¹ *Id.*; See also Gottheil, *supra* note 1 at 2238 (“[M]any used the perception that unions had become too powerful and irresponsible to seek dramatic changes in the structure of collective bargaining.”).

⁹² Gottheil, *supra* note 1 at 2238; DUBOFSKY & DULLES, *supra* note 71 at 325.

⁹³ Stefan J. Marculewicz & Jennifer Thomas, *Labor Organizations by Another Name: The Worker Center Movement and its Evolution into Coverage Under the NLRA and LMRDA*, 13 ENGAGE 79, 80 (2012).

⁹⁴ *Id.* (stating that Congress, with the intent to insure employees’ freedom from coercion by the unions as well as the employer, set out in the Taft Hartley Act to identify actions by unions that qualify as unfair labor practices); DUBOFSKY & DULLES, *supra* note 71 at 327 (summarizing the managerial rights and labor organization restrictions announced in the Taft Hartley Act: employer’s right to express their opinions on labor organizations, with the exception of threats of reprisals and promises of benefits; the right of managers to call for elections to determine the appropriate bargaining unit; prohibition against actions by labor organizations in an “attempt to coerce employers, engage in either secondary boycotts or jurisdictional strikes, or, in their turn, to refuse to bargain collectively.”).

⁹⁵ Gottheil, *supra* note 1 at 2238.

this effective tactic if they are deemed to fall within the NLRA's definition of "labor organization".

C. *Landrum Griffin Act attempts to address public concerns of union corruption*

While the Taft Hartley Act placed some significant restraints on the activities of unions, it did not include any provisions regarding the internal governance of unions. As public concern was aroused by stories of union corruption, Congress turned its focus to the internal affairs of labor unions.⁹⁶ In 1957, the Senate established a Select Commission on Improper Activities in the Labor or Management Field, which was to be led by Senator John McClellan.⁹⁷ The McClellan Committee revealed a starker image than anticipated, with various accounts of election fraud, racketeering, embezzlement and misuse of union funds, collusion between union officials and employers, and overall "union dictatorship".⁹⁸ The testimony implicated only a handful of unions, including the mighty Teamsters Union as well as some smaller-scale unions; however, the allegations of corruption were sufficient to cloak all of organized labor in suspicion.⁹⁹ After the committee submitted its report, Congress passed the Landrum-Griffin Act, or the Labor Management Reporting and Disclosure Act (LMRDA) of 1959.¹⁰⁰ The final act has been described as a compromise between reformers who sought an increase in internal union democracy and labor critics who saw this as an opportunity to weaken labor.¹⁰¹

Title I of the LMRDA, a form of Bill of Rights for workers, outlines fundamental rights of workers *vis a vis* their union.¹⁰² Title II requires labor organizations to disclose financial information regarding the organization and its officials to organization members, and it dictates that labor organizations create and maintain a constitution and bylaws detailing the structural, governance, and financial mechanisms in place.¹⁰³ Additionally, Title II requires labor organizations to submit this information, as well as other disclosure forms, to the Department of Labor's Office of Labor Management Standards (OLMS).¹⁰⁴ Title IV specifies the election requirements for organization officials, mandating that elections occur at specific times and by secret ballot.¹⁰⁵ Title V creates a fiduciary duty on the part of organization officials to members with respect to the organization's funds.¹⁰⁶

In addition to the detailed reporting and disclosure requirements, the LMRDA also served to further restrict the lawful actions of labor organizations. The prohibition against secondary boycotts was expanded to "prevent a union from bringing any pressure to bear on an employer to make him cease doing business with another employer."¹⁰⁷ Additionally, the act amended the

⁹⁶ *Id.* at 2239.

⁹⁷ DUBOFSKY & DULLES, *supra* note 71 at 348.

⁹⁸ *Id.* at 349-50.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 351; Gottheil, *supra* note 1 at 2240.

¹⁰¹ Gottheil, *supra* note 1 at 2240.

¹⁰² Marculewicz & Thomas, *supra* note 93 at 81 (detailing the protections included in Title I: granted equal rights to all members to nominate and elect representatives, attend meetings, and participate at meetings; prohibited any increase in member dues without majority approval; insured due process protections for members in all disciplinary matters; provided members the right to pursue civil enforcement of these protections in federal court.).

¹⁰³ *Id.* at 82 ("in addition to promoting transparency and protecting workers' rights to fair elections of union officials, the disclosure requirements imposed by Title II were intended to have a deterrent effect on the misuse of an organization's funds.").

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ DUBOFSKY & DULLES, *supra* note 71 at 351.

NLRA to include Section 8(b)(7) in the list of prohibited unfair labor practices. The new prohibition restricted picketing “for organizational or recognitional purposes by a union for more than 30 days if it has not filed a petition with the NLRB to represent the workers.”¹⁰⁸

Based on the literature written about the LMRDA with regards to worker centers, there are two issues to note at this juncture. First, the reporting requirements, intended to implement and safeguard internal democracy within labor organizations, seemed to have been based on an a “particular notion of institutional democracy” where “representative democracy is taken as a given.”¹⁰⁹ Second, the LMRDA’s legislative history indicates that there was some concern that the stringent and intrusive regulations on the internal governance of private labor organizations raised freedom of association issues.¹¹⁰ However, the enactment of the LMRDA indicates that a majority thought the “interference was justified in response to the specific problems identified by the Committee”, i.e. corruption and lack of internal democracy.¹¹¹ I will return to this idea of the perceived justification for infringing on a private organization’s freedom of association in Part VI.B.3, where I will pose the argument that the proffered justification for the intrusion on labor unions is not present in the context of worker centers.

IV. The Decline in Workers’ Bargaining Power

The recent literature on the decline in traditional labor unions and the rise of worker centers and other alt-labor groups have cited the courts, employers, and the changing socio-economic landscape as the primary reasons for why labor law is currently failing to adequately protect the rights of workers, particularly low-wage immigrant workers, to organize and act in mutual aid or protection.¹¹² While the NLRA has proven to be ineffective in both its stated protections and in its remedial scheme, the interpretations by the courts and subsequent amendments by Congress have served to grant employers greater protections over matters deemed to be managerial prerogatives. Consequently, the balance in bargaining power between labor and capital that Congress sought to reach through the Wagner Act has been upended with a thumb on the scales in favor of employers. Beyond the issues with the letter and spirit of the current labor law scheme, the changing social and economic dynamics since the time of the law’s passing have provided additional opportunities for employers to avoid unionization and have contributed to the creation of a new vulnerable class of workers.

A. *Weaknesses in the structure and interpretation of the NLRA as employers are able to evade the worker protections of the statute*

For a time after its initial enactment, the NLRA did accomplish what is set out to do, which was to elevate workers to an even playing field with employers by protecting their right to organize. However, some limitations inherent in the statute are worth noting. The statute does not cover all workers, leaving some large categories of workers unprotected. In defining the term “employees” as covered under the act, § 2(3) states

“[B]ut shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an

¹⁰⁸ Marculewicz & Thomas, *supra* note 93 at 82.

¹⁰⁹ Gottheil, *supra* note 1 at 2241.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2241-42.

¹¹² Kate Andrias, *The New Labor Law*, 126 YALE L. J. 2 (2016); *See also* Gottheil, *supra* note 1; Heather M. Whitney, *Rethinking the Ban On Employer-Labor Organization Cooperation*, 37 CARDOZA L. REV. 1455 (2016).

independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.”

Additionally, the amendments to the act, the Taft Hartley Act and the Landrum-Griffin Act, further restrained the potential effectiveness of labor organizations in representing workers and enforcing their rights by prohibiting certain economic strategies and placing intrusive requirements on the formal governance and reporting of the entity. The Supreme Court has also weakened the protections of the NLRA in its interpretations of the act, some of which were later codified in the amendments to the NLRA, that “undercut the Act’s protection of the right to strike, made it easier for employers to oppose union campaigns, and generally shored up managerial rights of control over the workplace.”¹¹³

Employers have also found ways, both legal and illegal, to bypass the primary employee protections of the NLRA. With decisions by the Supreme Court that established the employer’s right to hire permanent replacements for striking workers and limited the scope of the mandatory subjects for collective bargaining, excluding “matters of entrepreneurial judgment”, employers have been able to avoid unionization by either subcontracting peripheral activities or by shutting down and relocating production.¹¹⁴ It has been argued that employers seeking to resist unionization are able to exploit the NLRA’s ineffective enforcement mechanisms, weak penalties for violations, and lengthy process delays.¹¹⁵

The weak penalties built into the NLRA do not properly disincentivize employers from violating employees’ rights to act collectively for their mutual aid and protection.¹¹⁶ If successful in a claim alleging termination in retaliation for collective activity, workers are eligible for back pay but are not entitled to punitive damages.¹¹⁷ In these retaliation cases, employees have an obligation to mitigate the damage from lost wages by seeking new employment in the meantime, further reducing the financial penalty on violating employers.¹¹⁸ For some workers, reinstatement may be an available remedy, but the proceedings have proven to be costly, drawn out, and ineffective.¹¹⁹ According to Professor Andrias of University of Michigan Law School, the median time between the filing of an unfair labor practice charge and the issuance of a final order from the NLRB approximates 500 days.¹²⁰ Considering the low probability and low cost of getting caught, the potential gains for taking illegal actions to prevent unionization are compelling reasons to disregard the law. Previous studies suggested that employers were capitalizing on this opportunity to refuse unionization.¹²¹ The NLRA is also limited in its ability to implement its stated goal to protect and facilitate collective bargaining. As

¹¹³ *Andrias, supra* note 112 at 17.

¹¹⁴ *Id.* at 26.

¹¹⁵ *Id.* at 5.

¹¹⁶ *Whitney, supra* note 112 at 1469.

¹¹⁷ *Id.*

¹¹⁸ *Andrias, supra* note 112 at 26.

¹¹⁹ *Whitney, supra* note 112 at 1469.

¹²⁰ *Andrias, supra* note 112 at 26.

¹²¹ *See id.* (explaining that one study has found that almost 25% of employers illegally discharge employees for protected concerted activity, while over 50% of employers made threats to close production operations); *Whitney, supra* note 112 at 1470 (citing a study from 2007 that found that one in five employees who take “an active role in organizing their workplace is illegally discharged for doing so.”).

the NLRA cannot impose its own terms if a party to negotiations fails to bargain in good faith under the act, the good faith bargaining requirement has very little bite.¹²²

B. An increasingly fissured economy brings changes in workforce structure and composition, as well as a precarious situation for low wage immigrant workers

The dawn of the fissured economy¹²³ and the rise of an increasingly contingent workforce have provided employers with additional opportunities to avoid the burden and cost of complying with the NLRA, and these law avoiding tactics, clearly in violation of the spirit of the labor laws, have not been deemed to be a technical violation of the law.

Inherent in the NLRA is a particular model of employment centered on the relationship between an individual employer and its employees.¹²⁴ The current labor law scheme was created during the New Deal-era and subsequently reflects the industrial economy of the time where blue collar workers, largely white males, enjoyed relatively secure fulltime employment with a single industrial employer and sought to bargain collectively with this employer as a way of expressing their collective voice.¹²⁵ However, this model no longer accurately reflects the realities of the 21st century economy and workforce, reducing the ability of the labor law scheme to address the problems facing workers in the modern era.

Starting in the 1970s, the American economy responded to increased domestic and international competition with a process that has been called “deindustrialization”.¹²⁶ American businesses reshaped themselves in an effort to adapt to the new age of international competitors successfully capturing the market on higher value, low-priced products in the mass production industries.¹²⁷ As capital began to move overseas, employment in manufacturing and industrial sectors contracted and employment in the service sectors, those largely unaffected by global competition, expanded.¹²⁸ During this period, there was an increasing trend in economic fissuring whereby businesses focus on the core activities of the company and slough off all peripheral activities by entering subcontracting relationships with domestic or international companies.¹²⁹ In subcontracting a particular project or an entire job, businesses “can take advantage of the downward pressure facing smaller companies that compete to win bids for those jobs.”¹³⁰ Additionally, businesses began to move away from the idea of fulltime, permanent employment and toward a free agent conception of employment, limiting the number of full time

¹²² *Andrias, supra* note 112 at 26.

¹²³ *Id.* at 21 (defining fissuring as the act of “shed[ding] activities deemed peripheral to their core business models and contract[ing] out work to domestic and foreign subcontractors.”). *See also Fine, supra* note 21 at 604 (describing the vertical disaggregation of firms as a result of the emergence of the network supply chain model).

¹²⁴ *Andrias, supra* note 112 at 28.

¹²⁵ *See Whitney, supra* note 112 at 1465 (NLRA-style unionization is premised on the notion of a single company that acts as a stable employer of long-term, fulltime employees. But a number of transformations to the nature of work have rendered anachronistic this conception, and with it the possibility of 1935-era unionization, increasingly impracticable.”).

¹²⁶ DUBOFSKY & DULLES, *supra* note 71 at 371 (describing the drop in employment in the basic mass-production industries resulting from the competition-driven development of technological advances to replace human labor); *Andrias, supra* note 112 at 21.

¹²⁷ *Id.*; DUBOFSKY & DULLES, *supra* note 71 at 370 (detailing the stiff competition American mass-production enterprises faced from producers in East Asia and industrial nations in Europe).

¹²⁸ DUBOFSKY & DULLES, *supra* note 71 at 372; *Andrias, supra* note 112 at 21.

¹²⁹ *Andrias, supra* note 112 at 21. Franchising relationships are another form of workplace fissuring. *See Whitney, supra* note 112 at 1466-67 (“As one way to lower costs while increasing profits, companies focus on creating and developing a brand while outsourcing day-to-day business operations to franchisees.”).

¹³⁰ *Whitney, supra* note 112 at 1466.

employees on the payroll and increasing their use of “contingent workers”.¹³¹ Through these changes in the structure of the workplace, employers have been able to shift the risk of increased competition to this new class of contingent, low-wage workers.¹³²

While employers restructured their businesses for both efficiency and financial reasons, a primary motivation behind the economic fissuring was to avoid unionization.¹³³ The use of subcontractors or overseas production facilities for peripheral activities became another avoidance strategy for employers to ignore current collective bargaining agreements, while tactics like permanently replacing strikers or closing a plant and opening non-union plants in new locations benefitted employers opposed to the organization attempts of its workers.¹³⁴ Despite the interference with employees’ right to organize and bargain collectively, these tactics were largely upheld by the courts, who seemed to place the managerial and property interests of employers above the collective action rights of employees.¹³⁵

Supply chains, subcontracting, franchising, and other nontraditional employment relationships make unionization near impossible.¹³⁶ In the case of subcontracting, workers may be successful in organizing their direct employer but may overall prove fatal to the success of the supplier company in competing with other, non-unionized supplier companies for bids for contracts in “low-margin markets”.¹³⁷ Similar obstacles to effective unionization exist in the franchisee-franchisor relationship, where employees may be able to effectively organize and bargain with the franchisee but still be helpless in the face of a franchisor that has significant control over the terms and conditions of employment and little incentive to negotiate. Downward pressure on wages in the franchising context creates incentives for franchisees to favor part-time, low wage positions as a way of avoiding the requirements under federal and state labor and

¹³¹ *Andrias, supra* note 112 at 21-22 (defining contingent workers as including part-time workers, temporary employees, and independent contractors).

¹³² *Gottheil, supra* note 1 at 2244 (explaining that by labeling a growing number of workers as temporary employees or as independent contractors, employers have been able to decentralize their production and increase their overall flexibility as well as shield themselves from the burden of complying with employment laws that only apply to statutory employees).

¹³³ *Andrias, supra* note 112 at 22.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See Whitney, supra* note 112 at 1466; *See also* LICHTENSTEIN, *supra* note 72 at 220 (in explaining the contemporary socio-economic context within which labor unions have proven largely unsuccessful in vindicating the rights of workers, the author writes:

“[T]rade unions are good for industrial society because they raise wages, not only for union members themselves but for the entire working population. Unions seek to take wages out of competition for individual firms, industries, and whole regions of the nation. Moreover, the labor movement has operated in a political sphere to raise the entire social wage, if only as a means to better defend its own wage standards.... But now, such ideas seem counterproductive, divisive, and vaguely unpatriotic. High wages made American manufacturing uncompetitive, and union work rules and formal grievance procedures stifled creativity and generated inflexibility.... In the United States the deregulation late in the 1970s of labor intensive, highly competitive industries like trucking, airlines, and telephone cast aside the New Deal worry that “cutthroat” business practices would generate wage debasement. And since increases in compensation among unionized workers far outpaced income growth in the non-union sector... American managers found themselves with a new incentive to put wages back into competitive play....”

¹³⁷ *Id.* (“[U]nionization of a single low-level supplier is not an effective strategy for workers looking to better their position.”).

employment laws.¹³⁸ And in all employment contexts, the increased mobility of capital has given legitimacy to the threat of plant closure as a response to attempts to organize a workplace.¹³⁹ As discussed above, the weak enforcement mechanisms of the NLRA fail to disincentive employers from using this threat, further increasing the obstacles to unionization in mobile industries.

The changing structure of the economy and, in turn, the workforce has limited the impact of the NLRA as employers are able to organize their businesses so to operate outside of the reach of the labor laws.¹⁴⁰ Of particular relevance for many contingent workers, the NLRA, again based on the traditional employment model, does not “facilitate collective action across multiple employers.”¹⁴¹ Organizing drives under the NLRA rely on the majority support of an appropriate bargaining unit within a single business. Subsequently, it is possible that employees will be powerless to bargain or negotiate with business entities that have significant control over the terms and conditions of their employment but are not the employees’ direct employer.¹⁴² Finally, the NLRA places explicit restrictions on employees’ use of multi-employer action in prohibiting secondary boycotts. Employees cannot participate in or encourage action that places pressure on one business in order to put economic pressure on an employer, even if the secondary business and the employer are intertwined, with an exception for joint employers.¹⁴³ While employers are free under the NLRA to organize their business in terms of the structure of its workforce and its working relationships with other employers to best suit their business goals, employees are restricted by the NLRA in terms of who can be organized and with whom they have a protected right to bargain over the terms and conditions of their employment.

The changes summarized in this section, as well as recent changes to immigration patterns, have created a new working class in need of new organizing techniques. Labeled the “precariat”, this new class of workers consists of precarious workers, or those who lack employment security and are largely “excluded from the legal protections that the organized labor movement struggled to achieve.”¹⁴⁴ An influx of unauthorized immigrant workers in the 1980s and 1990s aided the rapid growth of the precariat.¹⁴⁵ Both authorized and unauthorized immigrant workers are concentrated in low wage jobs in the service sector, due in part to the fact that immigrants are frequently relegated to the lower levels of the “employment ladder and

¹³⁸ *Id.* (explaining that the combination of low wages and part time employment status leads to high turnover rates, which in turn makes it more difficult to unionize with other workers in a short-term employment relationship).

¹³⁹ *Id.* at 223.

¹⁴⁰ *Andrias, supra* note 112 at 29.

¹⁴¹ *Id.* at 30.

¹⁴² There is the possibility that a second business could be determined to be a joint employer and therefore be required to bargain in good faith; however the law on the joint employer doctrine has recently seen reversal after reversal. As it currently stands, the governing standard for determining joint employer status is whether the two employers “share or codetermine those matters governing the essential terms and conditions of employment.” *Browning-Ferris Indus.*, 362 N.L.R.B. No. 186. However, there is a significant chance of reversal back to the earlier standard of “direct, immediate, and actual control over the terms and conditions of employment.” *Andrias, supra* note 112 at 31. While the more lenient joint employer standard will assist some employees, like those working for franchisees of a national franchisor, this joint employer standard will not cover many supply chain and subcontracting relationships in which a business, despite having a strong influence on the employment relationship, does not share control over the terms and conditions of employment. *Id.* at 31-32.

¹⁴³ *Id.* at 32.

¹⁴⁴ Ruth Milkman, *Introduction* to *NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT* 1, 2 (Ruth Milkman and Ed Ott eds., 2014).

¹⁴⁵ *Id.* (explaining that the precarious status of unauthorized immigrant workers as a class is due to the added vulnerability to violations of labor and employment law protections and the tendency to not report violations to the appropriate government agencies).

frequently obtain only contingent work.”¹⁴⁶ Unauthorized immigrant workers experience an added layer of vulnerability because of a constant fear of being discovered by immigration authorities. This fear leads to exploitation by employers who are aware of these workers’ illegal status and can use this knowledge against workers to prevent them from seeking redress to wage theft, unsafe working conditions, and other labor and employment law violations.¹⁴⁷ The new precariat, particularly immigrant workers, have been deprived of the labor rights deemed essential to democracy in the workplace, and therefore democracy in the larger society, and traditional labor unions have proven inadequate in their attempts to reinstate the balance between labor and capital in the contemporary social and economic context.

V. Business’ response: worker centers as fronts for traditional labor unions

A. *Calling foul: Business groups demand NLRB and Department of Labor to review worker centers*

Literature and media stories about worker centers and their place within the current labor law scheme first began to appear in earnest between 2012 and 2014, with labor critics becoming more vocal with the rise of worker center protests and broader social movements like the Fight for \$15.¹⁴⁸ In 2013, two House Republicans sent a letter to the Department of Labor requesting that they investigate whether worker centers are covered under the LMRDA and are therefore required to comply with its mandates.¹⁴⁹ A year later, the U.S. Chamber of Commerce published a report on the leading worker centers, warning employers of prolonged labor unrest from these rebranded labor unions.¹⁵⁰ In its introduction to its report, the U.S. Chamber of Commerce described the worker center movement as a front for labor unions to increase their membership without complying with burdensome labor law requirements that traditional labor unions must abide by.¹⁵¹ During this time, Republican members in the House of Representatives and labor critics claimed that “worker centers, by not registering as unions are wrongfully skirting the organizing, disclosure, and strike regulations that govern full-fledged unions.”¹⁵² For many in the pro-business camp, the relationship between traditional unions and worker centers is such that many worker centers were founded by individuals from the traditional labor movement or are tied closely with labor unions through financial support.¹⁵³ Business groups have argued that

¹⁴⁶ Gottheil, *supra* note 1 at 2246-47.

¹⁴⁷ *Id.* at 2247 (describing the “silent compact” that exists between employers and unauthorized immigrant workers by which the workers waive their rights to speak out against unfair practices or unsafe working conditions in exchange for “corporate indifference to their legal status.”).

¹⁴⁸ Michael Saltsman, *The Labor Department Needs to Scrutinize Union’s ‘Work Center’ Loophole*, FORBES (Jan. 5, 2018, 10:33 AM) (summarizing the debate surrounding worker centers, describing the Fight for \$15 campaign as “ground zero”).

¹⁴⁹ Stephen Lee, *Worker Centers Push Back Against Allegations of Being Union ‘Front Groups’*, BLOOMBERG BNA: LABOR RELATIONS WEEK (Aug. 21, 2013) (http://0-news.bna.com/lola.law.upenn.edu/lrln/display_batch_print_display.adp?searchid=31198202)

¹⁵⁰ WORKFORCE FREEDOM INITIATIVE, U.S. CHAMBER OF COMMERCE, THE NEW MODEL OF REPRESENTATION: AN OVERVIEW OF LEADING WORKER CENTERS 2 (2014) (https://www.uschamber.com/sites/default/files/documents/files/wfi_worker_center_study_-_new_model_of_representation_final_version_downloaded_2.20.14.pdf).

¹⁵¹ *Id.* at 2-3 (“[M]any labor unions have created, or in some cases sought to harness, what they portray as grassroots organizations commonly referred to as worker centers. In spite of their appearance, however, the most well-known of these groups hardly represent grassroots uprisings by workers. Instead, they are, for the most part, formed and incubated by well-established and well-funded labor unions and foundations.”).

¹⁵² Lee, *supra* note 149.

¹⁵³ *Id.*

worker centers should be held to the same reporting and disclosure requirements and activity prohibitions that labor unions are held to because worker centers perform the same activities as unions, particularly in putting economic pressure on employers to improve work conditions.¹⁵⁴

Perhaps the most substantive argument posed by labor critics as to why the requirements and restrictions under the NLRA and LMRDA should be applied to worker centers is that these requirements secure workers' rights *vis a vis* their labor representatives and therefore provide significant protections and benefits to workers.¹⁵⁵ The labor laws governing the internal governance of labor unions were intended to establish the accountability of these organizations to their members through the "promotion of the principles of organizational democracy, access to basic information and promotion of a duty of fair representation."¹⁵⁶ If worker centers are not considered labor organizations required to comply with the strictures of the labor laws, these organizations will avoid accountability to the workers that they represent. While worker centers may serve a useful function, "no organization, no matter how laudable its mission, is above reproach."¹⁵⁷ It is possible the corruption and fraud that tarnished the records of traditional labor unions could plague worker centers, and compliance with the labor laws should be required to prevent this possibility from becoming a reality.¹⁵⁸

Seeing hope for a pro-business decision from the Trump administration, pro-business groups have renewed their calls to the NLRB and the DOL to determine the status of worker centers in relation to the NLRA and the LMRDA. Labor critics have posed the same arguments they made in 2013 and 2014, primarily that worker centers are rebranded labor unions that have been permitted to act like unions while "dodging rules" put in place to curb some of these behaviors.¹⁵⁹ Most of the energy of worker center critics has been spent in appealing to the Department of Labor to apply the LMRDA to worker centers and order them to file the same financial disclosure forms required of unions.¹⁶⁰ In the minds of many business groups, "[i]f it looks like a union and acts like a union, it should be treated like a union."¹⁶¹

Business groups and supporting members of Congress may see their calls for scrutiny come true in the near future, which makes the labor organization question outlined below all the more relevant. In a hearing before the House Education and the Workforce Committee in November 2017, Labor Secretary Alexander Acosta, in response to a question from a committee member, said the department was looking into the legal status of worker centers.¹⁶² While there has been no update or further statements made by the Department of Labor on this matter, there

¹⁵⁴ Steven Greenhouse, *Advocates for Workers Raise the Ire of Business*, N.Y. TIMES (Jan. 16, 2014) (<https://www.nytimes.com/2014/01/17/business/as-worker-advocacy-groups-gain-momentum-businesses-fight-back.html>)

¹⁵⁵ Marculewicz & Thomas, *supra* note 93 at 79.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See Saltsman, *supra* note 148.

¹⁶⁰ Chris Opfer & Jasmine Ye Han, *Worker Centers May Get Closer Look Under Trump*, BLOOMBERG LAW (Feb. 16, 2017) (<https://www.bna.com/worker-centers-may-n57982083896/>) (describing the LM-2 form as an example, which requires labor organizations to report dues and fees collected, where they spend and receive cash, and loans and investments).

¹⁶¹ *Id.* (quoting Senior Vice President Matt Haller of the International Franchise Association).

¹⁶² Ben Penn & Tyrone Richardson, *Labor Department May Boost Scrutiny of Worker Centers: Acosta*, BLOOMBERG BNA: LABOR RELATIONS WEEK (Nov. 22, 2017) (http://0-news.bna.com/lola.law.upenn.edu/lrln/display/batch_print_display.adp?searchid=31198210).

is cause for concern for worker centers.¹⁶³ If applied to worker centers, the requirements and prohibitions of current labor laws would distort the worker center model and impair the effectiveness and success these centers have had to the extent that it is due to the flexible, unrestrained structure.¹⁶⁴ Perhaps the greatest threat to worker centers is the risk of losing unrestrained access to the tactic of secondary boycotting. If § 8(b)(4) of the NLRA were applied to worker centers, these organizations would lose their ability, and one of their primary strategic advantages, to target supply chain retailers and other business entities that have real, yet indirect, influence on the terms and conditions of employment but are not directly engaged in a labor dispute with the worker center.

VI. The “Labor Organization” Question: Should Worker Centers Be Treated as Statutory Labor Organizations under the NLRA and LMRDA?

The debate between capital and labor takes both descriptive and normative forms: do worker centers fall within the scope of the NLRA and LMRDA and should they? Business groups agitate for greater scrutiny on worker centers and demand the determination that worker centers are labor organizations and must abide by the rules under the labor laws. Labor advocates claim that these centers do not fall under the statutory “labor organization” umbrella and find it would be inappropriate to apply labor laws developed in one historical context to organizations working in an entirely different context.

I will argue that, based on previous Board interpretations of the statutory definition of labor organization, worker centers do not fall within the labor organization definition. In the event that worker centers begin to develop a pattern or practice of performing activities that push it over the threshold of a statutorily-defined labor organization, I argue that the labor laws should still not be applied to these centers. First, worker centers, through their structures and strategies currently unfettered by antiquated labor law provisions, champion labor policy and goals, adopted by Congress in 1935, in the modern era. Second, the concerns and intentions underlying the broad definition of “labor organization” under the NLRA and LMRDA have not been triggered by the activities of worker centers, negating any policy-based reason to extend the

¹⁶³ David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKLEY J. EMPLOYMENT & LABOR L. 470, 499, 502 (2006) (summarizing the potentially severe consequences for worker centers if they are determined to be labor organizations as defined under the NLRA and LMRDA, including: Prohibitions against secondary boycotts as defined under § 8(b)(4) would apply and restrict worker centers from picketing “neutral” employers (an entity not party to the labor dispute). Picketing for recognition by an employer would be capped at 30 days under § 8(b)(7)(C). Picketing an employer where there is already an exclusive bargaining representative certified by the Board or recognized by the employer would violate § 8(b)(7)(A) or (B). Elections would be required for officer positions every three or five years. Filing annual financial reports would be required, and financial records would have to be made available to members. Officers would be subject to fiduciary duties. A constitution and bylaws for the worker center would have to be adopted and filed with the Department of Labor.).

¹⁶⁴ See *Gottheil*, *supra* note 1 at 2260 (describing the labor law provisions as being antithetical to the very nature of worker centers and offering a brief summary of the likely consequences of worker centers having legal labor organization status. Imposing representational democracy (one-person-one-vote) would distort the highly participatory, democratic decision making processes worker centers strive for by reducing what is currently a collaborative process into a single voting event. Imputing fiduciary duties and bonding requirements on leaders will likely make worker center members shy away from the leadership development programs. Requiring equal membership for all members would detract from the principle of earned membership. Prohibitions against secondary boycotts would prevent worker centers from engaging in direct economic action against manufacturers, retailers, or franchisors that hold power over the terms and conditions of employment but are not direct employers, which could be devastating for worker centers’ largely contingent worker population).

definition to include worker centers. Lastly, the differences between labor unions and worker centers raises constitutional questions concerning the intrusion into the internal governance of private worker center associations. Both policy and constitutional-based arguments weigh in favor of refraining from applying the current labor law scheme to worker centers.

A. Worker centers do not fall within the statutory definition of “labor organization”

Despite the demands of business groups, it is inappropriate to have a brightline rule that worker centers qualify as labor organizations under the NLRA and LMRDA. As Board decisions interpreting the statutory definition indicate, the “labor organization” analysis is a fact-intensive analysis and depends on how the alleged labor organization interacts with the employer. With that, I would like to caveat the below analysis by noting that it would be useful to have an updated study of worker centers to see if the detailed survey in 2006 is still reflective of the current worker center model. Because the 2006 survey provided a wealth of information on the foundational features and common characteristics of worker centers, it is likely to be an accurate, relevant portrayal of worker centers. However, having a more recent, in-depth look at the specific activities the worker centers are engaging in would provide additional support to the statutory argument that worker centers are not labor organizations.

1. Labor organization under the NLRA

Although there may be some uncertainty in how the NLRB and Department of Labor, as well as the courts of appeal, will interpret and apply previous case law on the labor law question, the current situation as it stands today suggests that worker centers will not be considered labor organizations as defined by the statutes. “Labor organization” is defined in § 2(5) of the NLRA as being “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”¹⁶⁵ Worker centers will likely satisfy the elements of “any organization”, employee participation, and concerning grievances, wages, and conditions of work.¹⁶⁶ The labor organization question, therefore, will turn on whether worker centers “exist for the purpose, in whole or in part, of dealing with employers”.¹⁶⁷

While there have been seminal decisions interpreting the meaning of “dealing with” that form the bedrock of “dealing with” analysis, the § 2(5) “labor organization” doctrine is far from clear and consistent. In the literature on the labor organization question, academics differ in how they view the Board’s jurisprudence on this question, relying on different Board decisions to support their assessment of the Board’s construction of § 2(5). The fact of the matter is that the Board’s decisions have lacked consistency and clarity.¹⁶⁸ Without having a coherent understanding of the Board’s historical interpretation of the statutory definition, it is difficult to predict how the Board will interpret it in the future. Adding to the uncertainty is the fact that the overwhelming majority of case law constituting the § 2(5) jurisprudence has been in the context of company-unions. The legal status of worker centers has not been addressed head-on in any NLRB decision or court of appeals case. As such, it is unclear whether the Board will apply its § 2(5) jurisprudence outside of the company-union context.

¹⁶⁵ 29 U.S.C. § 152(5)

¹⁶⁶ See *Rosenfeld*, *supra* note 163 at 483-85.

¹⁶⁷ *Id.* at 485.

¹⁶⁸ See *Whitney*, *supra* note 112 at 1497.

The NLRB's § 2(5) jurisprudence is founded in the Supreme Court case *N.L.R.B. v. Cabot Carbon*.¹⁶⁹ The case addressed the question of whether employee committees, established for the purpose of addressing issues of "mutual interest"¹⁷⁰ through monthly meetings with plant management, were labor organizations under § 2(5).¹⁷¹ In holding that the lower court erred in finding that the employee committees were not labor organizations under § 2(5) "simply because they did not 'bargain with' employers in the 'usual concept of collective bargaining'", the Court established a broad construction of the "dealing with" clause. Recounting the legislative history of § 2(5), the Court stated that Congress' conscious choice to include the language "dealing with" and not "bargaining collectively" indicates that "dealing with" should not be considered to be synonymous with "bargaining collectively".¹⁷² In addition to enunciating the principle that organizations may be considered statutory labor organizations in the absence of traditional collective bargaining, *Cabot Carbon* also shed some light on how the language of § 2(5) should be understood and applied. Without specifically articulating the exact analysis to be undertaken, it is clear the Court examined both the stated purpose of the committees as well as the functions of the committees in order to determine that the employee committees existed "for the purpose, in part at least, 'of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'"¹⁷³ Therefore, the "dealing with" element of a § 2(5) labor organization requires an analysis of both the explicit, stated purpose of the organization and the implicit purpose of the organization as inferred from the actions of the organization.

The Board articulated its understanding and interpretation of the "dealing with" language in § 2(5) in its 1992 decision *Electromation, Inc.*¹⁷⁴ Similar to *Cabot Carbon*, *Electromation* was decided in the context of an employer-dominated employee committee, also known as a company union. In order to determine whether the employer had violated § 8(a)(2) by dominating or interfering with the "action committees" in question, the Board needed to first determine whether these committees fell within the statutory definition of "labor organization" under § 2(5).¹⁷⁵ The Board found that the employer established several action committees, consisting of volunteer employees and members of management, to meet weekly to discuss issues such as wages, attendance programs, and leave policy.¹⁷⁶ Like the Supreme Court's analysis in *Cabot Carbon*, the Board answered the question of whether the action committees existed for the purpose of dealing with the employer by looking at the express purpose of the committees as well as the implicit purpose based on what the committees actually did.¹⁷⁷ Under

¹⁶⁹ 360 U.S. 203 (1959).

¹⁷⁰ *Id.* at 204 (defining issues of "mutual interest" as including grievances and the process for handling grievances).

¹⁷¹ *Id.* at 204-06. The primary issue, although was necessarily secondary to the determination of labor organization status, was whether the defendant employer committed an unfair labor practice under § 8(a)(2) by dominating or interfering with the employee committees. *Id.* at 207.

¹⁷² *Id.* at 211.

¹⁷³ *Id.* at 213.

¹⁷⁴ 309 N.L.R.B. 990 (1992).

¹⁷⁵ As it will be relevant to the discussion in subsequent sections, it is worthwhile to note the Board's discussion of the congressional intent behind the language of § 2(5). The Board notes that the term "labor organization" was defined broadly in the act in pursuit of the Wagner Act's goal to eliminate company unions, or unions over which the employer dominated. "In sum, Congress brought within its definition of 'labor organization' a broad range of employee groups, and it sought to ensure that such groups were free to act independently of employers in representing employee interests." *Id.* at 994.

¹⁷⁶ *Id.* at 991.

¹⁷⁷ *Id.* at 996.

this analysis framework, the Board determined that the action committees were created to “achieve a bilateral solution” to the issues workers complained of, and did indeed create a bilateral process by which employees and management worked toward “bilateral solutions on the basis of employee-initiated proposals.”¹⁷⁸ This bilateral process to achieve bilateral solutions “is the essence of ‘dealing with’ within the meaning of § 2(5).”¹⁷⁹

The Board further expounded upon its bilateral mechanism refinement in *E.I. Du Pont De Nemours & Co.*¹⁸⁰ As in both *Cabot Carbon* and *Electromotion*, this case was based on a challenge against internal committees composed of both employees and management members that alleged the committees constituted an employer-dominated labor organization.¹⁸¹ The Board explained that the term “dealing” indicates a bilateral mechanism, but does not require a compromise between the two parties.¹⁸² Instead, this “‘bilateral mechanism’ ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed....”¹⁸³ The “dealing with” prong of the § 2(5) analysis, therefore, is met if the evidence shows that either such a pattern or practice existed or that the organization was created for the purpose of engaging in such a pattern or practice.¹⁸⁴ However, the Board indicated that “if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.”¹⁸⁵ Because the committees in question entailed employees discussing and submitting proposals on statutory subjects to management committee members who could reject them if they chose, the Board found the “dealing with” requirement met.¹⁸⁶

Later board decisions confirmed the “dealing with” prong requires a pattern or practice of interactions between workers and an employer and not isolated incidents between the parties.¹⁸⁷ However, the Board’s *Electromotion* progeny has raised many questions that remain unanswered. For one, *Cabot Carbon*’s holding that “dealing with” is not synonymous with collective bargaining begs the question: “if ‘dealing with’ is less than bargaining, what is it more than?”¹⁸⁸ The Board has not yet established the lower limits of the “dealing with” definition, meaning the Board could ultimately decide it includes activities that worker centers commonly engage in.¹⁸⁹ Secondly, some academics have sensed a tension between the Supreme Court’s decision in *Cabot Carbon* and the NLRB’s later decisions. Professor Michael Duff questions the distinction between *E.I. Du Pont De Nemours & Co.*’s “pattern or practice” refinement and collective bargaining, asking why it is the case that “a statutory labor organization may be found without ‘bargaining’, but that a ‘pattern and practice of exchanging proposals over time’ implies

¹⁷⁸ *Id.* at 997.

¹⁷⁹ *Id.*

¹⁸⁰ 311 N.L.R.B. 893 (1993).

¹⁸¹ *Id.* at 893, 895.

¹⁸² *Id.* at 894.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 895.

¹⁸⁷ See Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKLEY J. EMPLOYMENT & LABOR L. 232, 284 (2009).

¹⁸⁸ Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U.L. REV. 837, 866 (2014).

¹⁸⁹ *Id.*

that a group is a labor organization?”¹⁹⁰ With this confusion and the NLRB’s failure to clarify it, Professor Duff comments that “it is often risky to rely on the NLRB’s statutory interpretations given the reality of hostile appellate review,” further emphasizing the uncertainty surrounding the § 2(5) analysis and how it might be applied to worker centers.¹⁹¹

However, all is not lost in this confusion. There has been one occasion to date in which the activities of a worker center were analyzed under the “labor organization” jurisprudence, and the outcome was favorable to worker centers. In 2006, the General Counsel of the NLRB issued an Advice Memorandum at the behest of a Regional Director stating his findings on whether the ROC was a labor organization under § 2(5) and therefore could be found in violation of the NLRA’s restrictions against recognitional picketing under § 8(b)(7)(C).¹⁹² The memo addresses complaints filed against the worker center Restaurant Opportunities Center of New York (ROC-NY) in response to demonstrations ROC-NY led against a few upscale chefs and the subsequent settlement agreements that were reached. In one case, the ROC-NY protested outside of chef Daniel Boulud’s restaurant Daniel in response to the chef’s discrimination against Haitian and Bangladeshi employees applying to become waiters.¹⁹³ ROC-NY engaged in similar demonstrations against chef Mario Batali’s restaurant Del Posto over misappropriated tips and unpaid overtime, reaching a \$1.5 settlement agreement that “included new policies on promotions and paid sick days.”¹⁹⁴

The General Counsel found that, although the ROC-NY’s lawsuit settlement negotiations with the restaurants “could arguably be considered ‘dealing’ within an expansive interpretation of Section 2(5)”, the evidence did not show that ROC-NY’s conduct constituted “a pattern or practice of dealing over time.”¹⁹⁵ In support of its decision, the General Counsel analyzed the ROC-NY’s lawsuit settlement negotiations through the *Electromation* progeny, finding that the lawsuit settlement negotiations and subsequent agreements were discrete, non-reoccurring interactions with the employers that were limited to “settling legal claims raised by employees.”¹⁹⁶ Despite the fact the negotiations spread across a span of time, the General Counsel considered this to be dealings that were “limited to a single context or single issue” and that nothing in the agreements implied “an ongoing or reoccurring pattern of dealing with employment terms and conditions, beyond the resolution of the current dispute.”¹⁹⁷ Absent a showing of pattern or practice of dealing over time, the General Counsel held that ROC-NY was not a labor organization under § 2(5).¹⁹⁸ While some academics take issue with the analysis undertaken by the General Counsel¹⁹⁹, this decision provides a potential framework under which

¹⁹⁰ *Id.* at 857.

¹⁹¹ *Id.* at 858.

¹⁹² Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Celeste Mattina, Reg’l Dir., Region 2, NLRB, regarding Rest. Opportunities Ctr. Of N.Y., Cases 2-CP-1067, 2-CP-20643, 2-CP-1071, 2-CB-20705, 2-CP-1073, & 2-CB-20787, 1-4 (Nov. 30, 2006) [hereinafter ROC Memo] available at <http://www.nlrb.gov/sharedfiles/Advice%20Memos/2006/2-CP-1067.pdf>.

¹⁹³ *Greenhouse*, *supra* note 154.

¹⁹⁴ *Id.*

¹⁹⁵ ROC Memo, *supra* note 192 at 3.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (The memo addressed the question of whether an arbitration clause in a settlement agreement implied an ongoing relationship between the worker center and the employer by viewing these clauses as “strictly adjudicatory enforcement mechanisms that do not involve any further ‘dealing’ under Section 2(5).”).

¹⁹⁸ *Id.* at 4.

¹⁹⁹ See *Marculewicz & Thomas*, *supra* note 93 at 84 (arguing that the General Counsel’s analysis failed to properly consider the intent element of the “labor organization” jurisprudence, stating that the analysis was weak because it

worker centers could be analyzed by the NLRB in the future. Based on both the text of the statute and the holding of the ROC memo, some academics have argued that worker centers would not fall under the statutory definition of labor organization²⁰⁰.

Although an updated survey of worker centers would be useful, the information currently available suggests that the explicit purpose of worker centers as well as the activities undertaken by the centers would not qualify as a pattern or practice of dealing with an employer, or the purpose of engaging in such a pattern or practice. While worker centers engage in economic action organizing that seeks to place economic pressure on employers, these direct action campaigns are traditionally a tactic that supplements a lawsuit or other legal claim filed against the employer and serves as a method to encourage employers to enter settlement agreements. Worker centers do not have an ongoing role at any particular work place, and they will likely not engage with a particular employer a second time unless there is a violation of any settlement agreement or court order. Based on the analysis in the ROC Memo, this form of direct economic action campaign and settlement agreement negotiations do not constitute “dealing with” under the NLRA.

Moreover, worker centers do not exist for the purpose of dealing with individual employers in the sense envisioned by the act. The historical goal of worker centers is to give a collective voice to marginalized, vulnerable workers in a variety of industries. Centers seek to place the concerns of these workers on the national agenda by advocating for better enforcement of current labor and employment law protections and for more protective regulation and legislation. In their efforts to increase public awareness and spur public and political action, centers engage in social policy organizing, which may involve demonstrations, protests, and boycotts of individual employers or multiple employers within an industry. These activities seek to engage the public and government officials, and not just employers. Actions that engage employers are necessary to the main objective of worker centers: elevate the social, political, economic interests of low-wage workers so as to be an equal player at the bargaining table.

2. Labor organization under the LMRDA

The “labor organization” analysis under the LMRDA is almost identical to the analysis under § 2(5) of the Wagner Act, although there is some debate about whether the definition of labor organization under the LMRDA expands the scope of the NLRA or limits it. Despite this uncertainty, there is a strong argument to be made that worker centers do not fall within the statutory definition of labor organization under the LMRDA. § 3(i) of the LMRDA defines a labor organization as “a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a

focused entirely on the “functional relationship between ROC-NY and the few employers involved in the cases rather than on the ROC-NY’s overall purpose.”).

²⁰⁰ See *Naduris-Weissman*, *supra* note 187 at 287 (“The ROC-NY Advice Memo suggests that mere efforts to influence an employer do not constitute ‘dealing’ and that the Board will apply the ‘bilateral mechanism’ concept rigorously to worker center activity, giving paramount importance to the ‘pattern or practice’ notion.... Therefore, even under this ‘traditional analysis’, most worker center activity will not be considered ‘dealing with’ the employer if it is related to lawsuit activity, if the interactions are not sufficiently bilateral, or if the communications do not recur over time.”).

national or international labor organization, other than a State or local central body.”²⁰¹ Besides the added language about the type of organization included under the statute and the types of subjects that are dealt with, this definition contains the same elements as the definition under the Wagner Act: some form of organization, employee participation, the purpose of dealing with employers, and dealing with statutory subjects.

However, § 3(i) is followed by § 3(j) which defines when a labor organization will be deemed to be engaged in an industry affecting commerce.²⁰² There is a debate between some academics as to the relationship between these two sections. Some argue that § 3(j) limits the scope of § 3(i) in that in order to be a § 3(i) labor organization, an entity must fall within one of the five categories of § 3(j)²⁰³. Others argue that § 3(j) should not be read to limit § 3(i) but rather to add clarity to what it could mean for an organization to be engaged in an industry that affects commerce.²⁰⁴ Labor advocate Eli Naduris-Weissman notes that while there is no definitive guidance on the appropriate reading of these two sections, regulations from the Department of Labor may help to shed some light. Although the regulations specify that the term “labor organization” will be interpreted broadly, the regulations “also suggest that a ‘labor organization’ must meet the general definition of section 3(i) as well as one of the categories of section 3(j) to be subject to the LMRDA requirements.”²⁰⁵

Despite this uncertainty in the proper reading of the statute, the labor organization analysis is still likely to hinge on the “dealing with” interpretation. If § 3(i) and § 3(j) are read together, it could be argued either way whether worker centers fall within the five categories of organizations under § 3(j).²⁰⁶ If worker centers do fall within one of these five categories, the

²⁰¹ 29 U.S.C. § 402(i).

²⁰² 29 U.S.C. § 402(j) (“A labor organization shall be deemed to be engaged in an industry affecting commerce if it:

1. Is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or
2. Although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or
3. Has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or
4. Has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or
5. Is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body.”

²⁰³ See *Naduris-Weissman*, *supra* note 187 at 288 (“[T]he two sections must be read together, with section 3(j) specifying the particular types of labor organizations that fall within the Act’s coverage so long as the general definition is also met.”).

²⁰⁴ See *Marculewicz & Thomas*, *supra* note 93 at 85 (arguing that § 3(j) provides examples of organizations that fall within § 3(i) and that Congress generally intended “labor organizations” to be defined broadly under the LMRDA to capture any organization that engages in any extent in the representation of employees).

²⁰⁵ *Naduris-Weissman*, *supra* note 187 at 288-89 (citing to 29 C.F.R. § 451.4(a) and to the congressional intent to target labor union affairs in enacting LMRDA).

²⁰⁶ Eli Naduris-Weissman argues that worker centers would not fall into any of the five categories, considering the second category to be the only realistic possibility and briefly dismissing this possibility. *Id.* at 290. Naduris-Weissman equated the phrase “recognized or acting as the representative of employees” with representing employees in collective bargaining, but did not elaborate on why acting as a representative necessarily means representing employees in collective bargaining.

question of labor organization status will turn on whether the center exists for the purpose of “dealing with” under § 3(i), which is analyzed under the § 2(5) labor organization jurisprudence.²⁰⁷

Similar to the NLRB General Counsel’s Memo regarding whether ROC-NY fell within the scope of § 2(5), the Department of Labor, the agency that oversees enforcement of the LMRDA, engaged in the labor organization analysis under § 3(i) of the LMRDA in responding to a request from Republican congressmen for a Department inquiry into the status of worker centers. In 2013, Representatives Kline and Roe sent a letter addressed to Secretary Perez requesting an official determination on whether worker centers, naming six centers in particular, are labor organizations under the LMRDA and are therefore required to comply with the reporting and disclosure provisions of the act.²⁰⁸ In response, the Department of Labor sent a letter to Chairman Kline outlining the Department’s historical framework for analyzing labor organization status under § 3(i) and its previous determinations as to whether ROC falls within the statutory definition of labor organization.²⁰⁹

In his response letter, the Assistant Secretary of the Department of Labor explained that in making labor organization determinations for purposes of LMRDA enforcement, the Department applies the statutory test under § 3(i), which requires a showing that the entity is (1) an organization engaged in an industry affecting interstate commerce, (2) involves the participation of employees, and (3) exists in whole or part for the purpose of dealing with employers on terms and conditions of employment.²¹⁰ While the letter declined to specifically address the request for information on the six worker centers, the letter reminded the Chairman that the Department has “twice concluded—in 2004 and 2008—the ROC is not a labor organization under the LMRDA.”²¹¹ The Assistant Secretary explained that the evidence presented did not show that ROC was the exclusive representative of the employees, had engaged in collective bargaining, negotiated terms and conditions with the employers, or had the purpose of doing any of the above. Further, the evidence failed to show any “interchange of any kind between ROC and employers and, therefore, no dealing or intent to deal existed between ROC and employers.”²¹² The letter specifically stated that the Department, in these two decisions, noted that “the routine activities of legal service providers and activities targeting employers such as picketing, handbilling, and protesting, did not constitute dealing.”²¹³ Without providing any explanation, the letter also indicated that the Department concluded that “ROC was not engaged in an industry affecting commerce under section 3(j) of the Act.”²¹⁴

As analysis under the LMRDA definition of labor organization is likely to closely mirror the analysis under § 2(5), the same arguments can be made in support of the position that worker

²⁰⁷ The analysis in the previous section can be used to argue that worker centers do not qualify as labor organizations under the LMRDA.

²⁰⁸ Letter from John Kline, Chairman, Committee on Educ. and the Workforce, and David Roe, Chairman, Subcommittee on Health, Employment, Labor, and Pensions, to Thomas Perez, Secretary, U.S. Dept. Labor, regarding LMRDA requirements applicable to worker centers (July 23, 2013) *available at* https://edworkforce.house.gov/uploadedfiles/07-23-13_letter_dol_worker_centers.pdf.

²⁰⁹ Letter from Brian Kennedy, Asst. Secretary, Dept. Labor, to John Kline, Chairman, Committee on Educ. and the Workforce, regarding letter Chairman sent requesting clarification of labor organization standard (Aug. 26, 2013) *available at* https://edworkforce.house.gov/uploadedfiles/08-26-13_dol_response.pdf.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

centers do not fall within the statutory definition of labor organization and therefore should not be subjected to the requirements and restrictions of the LMRDA. If the NLRB and Department of Labor remain consistent with their past decisions and advice statements, then the normal range of worker center activities will not be considered “dealing with” because they will not pass the pattern or practice standard. If worker centers engage employers at all, it is likely to be similar to the activities ROC-NY engaged in, which included action through legal processes and simultaneous demonstrations and pickets. As these activities were seen as isolated activities pertaining to a single issue or context by both the NLRB and the Department of Labor, there is a strong argument to be made in support of future similar worker center activity based on this precedent.

B. Policy and constitutional arguments against applying current labor law restrictions to worker centers

In addition to this textual argument as to why worker centers are not bound by the NLRA and LMRDA’s provisions regarding labor organizations, academics have made poignant policy-based and constitutional arguments as to why these provisions should not be applied to worker centers. As worker centers seek to represent, organize, and advocate on behalf of workers across employers based on shared industry, geography, ethnicity, or immigrant status, centers appear to be “more like social movement organizations than traditional labor unions” at times.²¹⁵ Many of the concerns that spurred the passage of the Wagner Act and the LMRDA are not present in the worker center context and make application of the stringent restrictions and requirements inappropriate. Making it their mission to fight for social and economic justice, worker centers have provided a collective voice for workers marginalized in both the workforce and in general society. Therefore, the collective action of worker centers resembles protected political speech, raising constitutional concerns with any attempt to restrict or interfere with it.

1. Concerns inherent in labor prohibitions absent in worker center context

Based on his findings from his study, Eli Naduris-Weissman suggested that the NLRB “has exercised discretion when applying the term ‘labor organization’ guided by the policy concerns underlying the NLRA provision being adjudicated.”²¹⁶ Reviewing several Board decisions in which § 2(5) was interpreted and applied, Eli Naduris-Weissman found that “[T]he Board often uses the labor organization definition to further the Act’s purposes. Informal employee groups will be considered ‘labor organizations’ in some cases where such a finding is necessary to punish employer activity that trenches on section 7 rights. However, where a finding of ‘labor organization’ would subject the informal group to liability...the definition of labor organization loosens in order to protect concerted activity by employees.”²¹⁷

If the Board is moved to exercise its discretion when the policy implications call for it, then it should recognize the misfit of the policy underlying the current labor law provisions and the reality of the worker center movement.

In enacting the Wagner Act, Congress sought to eliminate employer-dominated unions, and this goal influenced the scope and language of the statute.²¹⁸ The legislative history of the Wagner Act indicates that labor organization was defined broadly in order to “encompass all

²¹⁵ Naduris-Weissman, *supra* note 187 at 307.

²¹⁶ *Id.* at 292.

²¹⁷ *Id.* at 301.

²¹⁸ *Id.* at 292.

forms of existing company unions within section 8(a)(2)'s company union prohibition".²¹⁹ The questions raised by worker centers does not involve employer-dominated unions or any other violation of § 8(a)(2). As the broad scope of the "labor organization" definition was intended for the purpose of preventing employer interference in workers' exercise of their § 7 rights, it is inappropriate to use this breadth to sweep up worker centers within the scope of the statute.

Similarly, the LMRDA was drafted and enacted after the McClellan Committee made its report of fraud, embezzlement, and other forms of corruption within the labor union organizations. The provisions of the act sought to deter the misuse of organizational funds as well as other abuses by increasing internal transparency and regulating the internal governance to promote democratically-run organizations.²²⁰ However, there is no history, nor any allegation of, worker center corruption, abuse, fraud, or violence.²²¹ Most worker centers have modest resources and rely primarily on charitable donations instead of membership dues for support, limiting the opportunity of corrupt individuals to misuse organization funds. Additionally, most worker centers are dedicated to promoting internal democracy as a "matter of philosophic commitment."²²² In fact, worker centers have made leadership development and training a large part of the services they offer workers in the hopes that workers themselves will play a role in the decision making and leadership of the center.²²³

While the social policy of preventing labor organization corruption may become more relevant in the worker center context as these organizations grow in power and size, there are other external checks in place that make a blanket application of the stringent labor law reporting and disclosure requirements unnecessary. In receiving financial support from charitable foundations, it is likely worker centers will be required to comply with reporting requirements and be subjected to some level of oversight by the charitable organization, which serves as a check on worker center activity. Worker centers that have received tax-exempt 501(c)(3) status will need to comply with the IRS' financial reporting requirements.²²⁴ Moreover, membership in a worker center is entirely voluntary, and worker centers do not assert themselves as the exclusive representatives of all employees in any particular worksite.²²⁵ The reasons for justifying the intrusions the NLRA and LMRDA imposed on private labor unions are not present here.²²⁶

2. Worker centers champion New Deal labor policies in the 21st century

The NLRA was enacted during a time of crisis. Workers were helpless against the power of capital, and struggled to share in the abundance created by their toil. Through the Wagner Act, Congress sought to empower the workers and to establish a balance between the relative bargaining power of labor and capital. Congress postulated that if business had the right to

²¹⁹ *Id.*

²²⁰ Marculewicz & Thomas, *supra* note 93 at 82.

²²¹ Benjamin Sachs, *Worker Centers and the "Labor Organization" Question*, ONLABOR (Sept. 1, 2013) (<https://onlabor.org/worker-centers-and-the-labor-organization-question/>).

²²² Catherine L. Fisk, *Workplace Democracy and Democratic Worker Organizations: Notes on Worker Centers*, 17 THEORETICAL INQUIRIES L. 101, 111 (2016).

²²³ *See id.*

²²⁴ IRS, <https://www.irs.gov/charities-non-profits/churches-religious-organizations/filing-requirements> (last visited Apr. 8, 2018). According to the IRS's website, non-profit 503(c)(3) organizations are required to file an annual information return form. However, non-profit organizations that have "annual gross receipts not normally in excess of \$25K" are not required to file this particular return form but will need to submit a less detailed notice form.

²²⁵ *See Fisk, supra* note 222 at 211-12.

²²⁶ *See Sachs, supra* note 221.

organize and unionize as it wished, so too should labor. If the 1935 labor law is still in place, so are these initial goals and findings. The ever-increasing domestic and global competition, incentivizing employers to cut costs and structure their businesses in a way that will increase its competitive edge, has created a contemporary labor crisis. Workers have been isolated from one another through contingent work status and subcontracting work structures. Employers have been permitted to fissure their businesses, shedding off peripheral activities and subcontracting out some of its work, as well as to structure their employment relationships in a way that reduces the cost of labor. However, unions have been prevented under the labor law's restrictions on boycotting and picketing from acting collectively against multiple employers or against manufacturers or retailers to effectively pressure the enterprise with real power over workers.

Workers, particularly low-wage, immigrant workers, have been stripped of their collective voice and their rights to collective action. When employers violate workers' § 7 rights, the remedies available under the NLRA fail to make workers whole or secure in their rights. Worker centers, through their flexibility in strategy, ability to target employers beyond employees' direct employer, and public policy campaigns directed at entire industries and sectors, have been able to re-establish some semblance of a balance between the relative power of labor and capital. In a statement explaining its support of worker centers, the Ford Foundation stated, "Growing numbers of workers are finding themselves in low wage jobs with limited resources to support a family and move up the economic ladder. The foundation's support for worker centers is one part of our effort to help more hard-working people climb out of poverty and achieve economic security."²²⁷ Worker centers have helped to put the interests and concerns of low wage workers back on the national agenda. By organizing national campaigns that involve picketing and boycotting retailers, manufacturers, retailers, and franchisors who have the ability to improve the conditions of low wage workers at the end of the supply chain, worker centers have adapted traditional labor tactics to apply economic pressure on capital in the new fissured economy. Through both its direct economic action organizing and "social bargaining"²²⁸, worker centers have "the potential to salvage and secure one of labor law's most fundamental commitments: to help achieve greater economic and political equality in society."²²⁹

Applying the restrictions under the NLRA against secondary boycotts would greatly weaken worker centers' ability to reach business entities lacking direct employer status but having indirect control over the terms and conditions of employment for low-wage, immigrant workers. The limitations and requirements under the NLRA and the LMRDA would fetter the flexibility with which worker centers have been able to develop new solutions to new organization challenges. As worker centers have used this flexible organizing and unencumbered tactical decision-making to represent workers and industries initially deemed too difficult to organize, applying the current labor law scheme to worker centers would leave low-wage, largely immigrant workers without a voice at the bargaining table between labor and capital, in contravention to the stated national labor policy.

²²⁷ *Greenhouse*, *supra* note 154.

²²⁸ *Andrias*, *supra* note 112 at 8 (defining social bargaining as a form of "bargaining that occurs in the public arena on a sectoral and regional basis." The article discusses the use of social bargaining to address worker issues on a larger scale compared to traditional bargaining with a particular employer. Social bargaining may involve public policy advocacy and organizing as well as direct action aimed at eliciting public and governmental attention and support.).

²²⁹ *Id.* at 9.

3. Application of NLRA and LMRDA restrictions would unjustifiably violate worker center's constitutional rights

As mentioned in Part VI.B.1, the historical justifications for labor law's incursions into the associational rights of private organizations are not present in the worker center context, raising constitutional concerns regarding the prospect of applying intrusive reporting requirements and restrictions on peaceful activities against worker centers. In his study, Eli Naduris-Weissman explains the tension between labor law restrictions and First Amendment associational rights:

“The goal of the NLRA was to establish a well-defined system of industrial relations through which employee organizations and employers could manage conflict. Organizations like worker centers, which do not seek to represent employees over day-to-day workplace conflicts, do not fit well within this system. Rather, many worker centers can better be classified as civil rights and social movement groups who engage in the type of speech and litigation activity that has been accorded the highest degree of First Amendment protection.”²³⁰

Worker centers engage in speech and action that is both politically and economically motivated, which requires greater caution from government agencies in applying burdensome restrictions than in the traditional labor union context.

Inherent in the above quote is the idea that the current labor scheme was based on a compromise between capital and labor that was struck in 1935.²³¹ “[T]raditional labor took part in a conscious bargain in which it gave up certain associational rights and flexibility in exchange for government support and protection.”²³² Labor unions accepted the restrictions on the organizing activities and, later, requirements for how they were to govern their organization in order to have their position as the exclusive bargaining representative within a particular workplace protected and enforced; worker centers have never sought these protections, nor have they petitioned to be the exclusive representative of any group of employees before their employer.²³³ Worker centers are entirely voluntary organizations, and there is “no constitutional justification for failing to provide worker centers with the full freedoms of assembly and association other voluntary associations receive.”²³⁴ Without receiving the protections under the NLRA and securing the right to be the exclusive representative of any particular workplace, worker centers should not be required to sustain the intrusion on their freedoms posed by the NLRA's restrictions on boycotting and picketing and the LMRDA's provisions regulating the internal governance and reporting. Applying the restrictions of the current labor law regime would not only be inappropriate in terms of the policy underpinnings of the labor laws but also constitutionally problematic.

In a 2015 guest post for the blog *OnLabor*, Cynthia Estlund, professor of employment and labor law at NYU Law School, discussed the balance of powers and restrictions placed on traditional labor unions under the labor law regime as well as the constitutional implications of the absence of these particular rights in the worker center context.²³⁵ Estlund describes the

²³⁰ Naduris-Weissman, *supra* note 187 at 307.

²³¹ See Gottheil, *supra* note 1 at 2264.

²³² *Id.*

²³³ *Id.*

²³⁴ Whitney, *supra* note 112 at 1512.

²³⁵ Cynthia Estlund, *Guest Post: Worker Centers as Labor Organizations? Labor Law's Quid without the Quo*, ONLABOR (June 11, 2015), <https://onlabor.org/worker-centers-as-labor-organizations-labor-laws-quid-without-the-quo/>.

bargain struck between capital and labor under the Wagner Act as labor law's "quid pro quo" by which the laws "both constrain and empower unions beyond what is normal and permissible for voluntary associations."²³⁶ Intrusive restrictions on labor union activity and self-governance can find justification in the special legal rights and powers that labor law bestows on them.²³⁷ Estlund describes these powers as including the right to vie to be the exclusive representative of employees, both group members and non-members, based on majority vote; to compel individual employers to bargain in good faith; and to bargain for the right to collect dues from non-members.²³⁸ However, worker centers do not possess or even seek to gain these rights. Worker centers do not hold themselves out as the exclusive representative of employees in their interactions with individual employers. Without possessing any of these powers, worker centers are simply voluntary associations engaged in peaceful economic and policy organizing, advocacy, and service to its members.²³⁹ "Without any distinctive legal powers, there is simply no constitutional justification for denying to worker centers the full freedom of expression, assembly, and association, and the freedom from intrusive regulation of their internal affairs, which other voluntary associations enjoy."²⁴⁰

The canon of constitutional avoidance advises that courts refrain from interpreting a statute "that raises serious constitutional questions."²⁴¹ The canon has been applied in the context of the NLRA, in which the Supreme Court held that "[W]here an otherwise acceptable construction of [the Act] would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."²⁴² In the context of worker centers, the canon would caution the NLRB and the Department of Labor against finding worker centers to be labor organizations under the NLRA and the LMRDA. Finding worker centers to be labor organizations based on the lawsuit-based direct action they engage in against particular employers would have a chilling effect on the right of workers to petition the court for redress, a constitutional right deemed to be of the utmost importance. Limitations on the direct action strategies employed by worker centers would be a limitation on the rights of low-wage, immigrant workers to engage in collective activity for mutual aid and protection. Restrictions on the rights of low-wage, immigrant workers to act collectively through worker centers to publicize the economic, political, and social inequalities they face would be an unwarranted and unconstitutional expansion of the labor law scheme, an expansion unintended by Congress in drafting the legislation in 1935.

VII. Conclusion

Concerned about the increasing rate of industrial strife, Congress drafted, debated, and adopted the Wagner Act, and subsequent amendments, to create and maintain a balance in economic power between capital and labor. The compromise struck between the parties called for labor unions to agree to State interference in the tactics employed and their internal governance in return for the protected and exclusive right to organize and represent workers in

²³⁶ *Id.* (describing the boundaries of permissible interference in voluntary associations as being defined by organizations' "constitutional entitlements to freedom of expression and association.").

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Naduris-Weissman*, *supra* note 187 at 316.

²⁴² *Id.* at 316 n.395 (citing *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

collective bargaining. Concerns about company unions, potential harm to neutral employers, union corruption, and undemocratic practices within labor organizations influenced the development of the labor law scheme and are integral in understanding the congressional intent behind the NLRA and LMRDA. Viewed in this context, the labor laws are inapposite to the situation that worker centers find themselves in. Worker centers have neither requested nor received protected status as the exclusive collective bargaining representatives of individual worksites, and they therefore should not be forced to suffer through State incursions into their private right of assembly. In the absence of complaints of company unions, corruption, and undemocratic practices, the broad definitions and sweeping statutory provisions developed in response to these concerns in labor unions should not be used against worker centers. Business groups posit worker centers as fronts for labor unions to avoid compliance with the law, but this characterization fails to fully capture the history, purpose, and functions of worker centers in this fissured economy. As worker centers may toe the line in terms of their “dealings with” employers, the sociopolitical context and policy underpinnings of the current labor law regime gravitate toward a finding of non “labor organization” status.